Chapter XIX.

IRREGULAR CREDENTIALS.

589. The House has declined to admit on prima facie showing persons whose elections and credentials appeared defective.

The House has declined to permit the oath to be taken by persons whose credentials had procured their enrollment by the Clerk.

On December 7, 1863,[3] at the organization of the House, during the administration of the oath to the Members, the names of A. P. Field, Thomas Cottman, and Joshua Baker, of Louisiana, were called.

Mr. Thaddeus Stevens, of Pennsylvania, objected to the swearing in of these Members, on the ground that their certificates and election were both defective.[4]

In the course of the debate Mr. Stevens said that where it was believed from the face of the documents read that they were in truth no credentials, as in this instance, where the papers were signed by a man whom nobody in the United States ever heard of as governor, and with his private seal attached, and where, as he was assured, no pretense of an election had ever been held, it had not been customary to swear in members until it had been determined that they were entitled to seats. A large amount of mileage and salary was involved.

After debate the motion of Mr. Stevens that the credentials be referred to the Committee on Elections, and that the administering of the oath be postponed until after that committee should have reported, was put to the House, and decided in the affirmative—yeas, 100; nays, 71.

590. An instance wherein the House gave prima facie effect to papers not in form of credentials, and which raised a technical question as to the election.—On December 6, 1875,[5] after the organization of the House by the election of a Speaker, a duly authenticated certificate of the State board of canvassers

[1] House sometimes enrolls where the Clerk may not. Section 328 of this volume.

Oath sometimes administered before the arrival of credentials. Sections 162–168 of this volume.

See also case of Gunter *v.* Wilshire (sec. 37 of this volume) and Grafton *v.* Connor (sec. 465); also the Senate cases of Revels (sec. 430) and Ames (sec. 438).

[2] See also case of the West Virginia Members (see. 522 of this volume) and the Colorado case (sec. 523).

[3] First session Thirty-eighth Congress, Journal, pp. 11, 12; Globe, pp. 7, 8.

[4] Both Field and Cottman were on the Clerk's roll and responded to the call, and voted for Speaker. See also the case of Roberts in the Fifty-sixth Congress, sections 474–480 of this volume.

[5] First session Forty-fourth Congress, Journal, p. 13; Record, pp. 172, 173.

of New York was presented showing the election of Nelson I. Norton from the Thirty-third district. This certificate showed that a portion of the votes had been cast for him as "Representative in Congress," and a portion for him as "Member of Congress." The votes cast for him under both designations exceeded the votes for his opponent.

Mr. Samuel S. Cox, of New York, stated that the law of New York required votes to be cast for "Representative in Congress," and therefore he proposed the reference of the credentials to the Committee on Elections.

But there being no opposition, Mr. Norton was permitted to take the oath, after which the credentials were referred.

591. A memorial alleging that credentials were not in accordance with law did not prevent the House from honoring them immediately.—On December 6, 1875,[1] at the organization of the House, during the swearing in of the Members elect, Mr. John Goode, jr., was challenged by Mr. James A. Garfield, of Ohio, and stepped aside until after the organization had been perfected by the election of a Speaker.

Then Mr. Garfield presented a memorial from one J. H. Platt, jr., setting forth particulars in which he alleged that the certificate of Mr. Goode was without authority of law.

It was urged on the other hand that the certificate was exactly in the form of the certificates on which the other Virginia Members had been seated, and was in accordance with the law of Virginia.

The House, without division, voted that the oath be administered to Mr. Goode.

592. The House has given full prima facie effect to credentials signed by a military officer in accordance with the law of reconstruction.

The action of the Clerk in enrolling a Member-elect does not prevent the House from questioning the prima facie force of the credentials.

On March 4, 1871,[2] while the Speaker was administering the oath to the Members-elect at the organization of the House, Mr. Michael C. Kerr, of Indiana, objected to the swearing in of the Mississippi delegation, on the ground that their credentials did not constitute in a just and legal sense prima facie evidence of title to seats on the floor. One of the credentials was read as follows:

HEADQUARTERS FOURTH MILITARY DISTRICT,
DEPARTMENT OF MISSISSIPPI,
Jackson, Miss., January 14, 1870.

I hereby certify that at an election held in the State of Mississippi on the 30th day of November and 1st of December, 1869, for the ratification of the constitution of said State, and for the election of Members of Congress, the said constitution was ratified; that article 12, section 25, of said constitution is as follows:

"Representatives in Congress to fill the existing vacancies shall be elected at the same time the constitution is submitted to the electors of the State for ratification and for the full term next succeeding their election, and thereafter elections for Representatives in Congress shall be held biennially. The first election shall be held on the first Tuesday after the first Monday in November preceding the expiration of said full term."

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[1] First session Forty-fourth Congress, Journal, p. 13; Record, p. 172.

[2] First session Forty-second Congress, Journal, pp. 9, 10; Globe, pp. 9, 10.

And that at said election, under section 25, article 12, of the constitution, Legrand W. Perce was elected a Member of the Forty-second Congress of the United States of America, from the Fifth Congressional district of Mississippi.

[L.S.]

ADELBERT AMES,
Brevet Major-General U. S. A., Commanding.

Attest:

EAMES LYNCH,
Provisional Secretary of State.

On these credentials the Clerk of the House had put the names of the Mississippi Members on the roll, and they had participated in the election of Speaker.

It was argued by Mr. John A. Bingham, of Ohio, that, in the absence of any challenge as to the qualifications of the Mississippi Members, they should be admitted to seats, as having the prima facie evidence that they represented the people of Mississippi. Therefore Mr. Bingham moved that the credentials of the Members-elect from Mississippi be referred to the Committee of Elections, and that they now be sworn in.

This motion being divided, the first portion was put and agreed to, and then on the second portion, "that they now be sworn in," there were yeas 121, nays 81.

Accordingly the oath was administered.[1]

593. Credentials being defective, but no doubt existing as to the election, the oath was administered to the Member-elect by unanimous consent.—On December 5, 1904,[2] the following credentials were laid before the House:

THE STATE OF SOUTH CAROLINA,

By the Secretary of State,

To the honorable the House of Representatives of the United States of America in the ——— Congress:

Whereas in pursuance of the constitution and laws of the State of South Carolina, and the Constitution and laws of the United States of America, an election was duly holden on the 17th day of May, in the year of our Lord 1904, in the said State of South Carolina, in the Second Congressional district thereof, for Representative of the said State of South Carolina, from the said Second Congressional district thereof, in the House of Representatives of the United States of America, in the ——— Congress; and

Whereas upon the examination of the returns of the said election, and by the determination and declaration of the board of State canvassers of the said State, filed and of record in my office, it appears that T. G. Croft was duly elected at the said election by the highest number of votes Representative of the State of South Carolina from the said Second Congressional district thereof, in the House of Representatives of the United States of America, in the ——— Congress:

Now, therefore, I, the secretary of state of the said State of South Carolina, by virtue of the power in me vested by the acts of the general assembly of the said State in such case made and provided, do hereby certify that the said T. G. Croft, at the election aforesaid, was duly elected Representative of the State of South Carolina from the Second Congressional district thereof, in the House of Representatives of the United States of America in the ——— Congress.

Given under my hand and the great seal of the State of South Carolina, in Columbia, this 28th day of May, in the year of our Lord 1904, and in the 128th year of the Independence of the United States of America.

[SEAL.]

J. T. GANTT,
Secretary of State of South Carolina.

The Speaker said—

The Chair desires to call the attention of the gentleman from South Carolina [Mr. Johnson], and also the attention of the House, to the credentials which have just been reported at the Clerk's desk. It seems

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[1] The election of which General Ames gave the certificates, was held in pursuance of reconstruction legislation of Congress, providing for such action on the part of the military authorities.

[2] Third session Fifty-eighth Congress, Record, pp. 3, 4.

to the Chair that, taking them altogether, the presumption is that Mr. Croft was elected a Member of the present Congress. But after all in making out the credentials the secretary of state has not filled the blanks which specify the number of the Congress to which Mr. Croft was elected.

Then, on motion of Mr. Sereno E. Payne, of New York, and by unanimous consent, the oath was administered to Mr. Croft.

594. A Senator-elect whose credentials were not in regular form was seated, the irregular portions being considered as surplusage.—On June 14, 1906,[1] in the Senate, Mt. Chester I. Long, of Kansas, presented the following credentials:

HON. CHARLES WARREN FAIRBANKS,

Vice-President of the United States and ex officio President of the Senate of the United States, Washington, D.C.:

Know ye that I, E. W. Hoch, governor of the State of Kansas, reposing special trust and confidence in the integrity, patriotism, and abilities of Alfred Washburn Benson, on behalf and in the name of the State, do hereby appoint and commission him a Senator in the Congress of the United States, from the State of Kansas, to fill vacancy caused by the resignation of Hon. Joseph R. Burton until the next meeting of the legislature of this State, and until a successor has been elected and qualified, and empower him to discharge the duties of said office according to law.

In testimony whereof I have hereunto subscribed my name and caused to be affixed the great seal of the State.

Done at Topeka, Kans., this 11th day of June, A. D. 1906.

E. W. HOCH, *Governor.*

By the governor:

[SEAL.]

J. R. BURROW, *Secretary of State.*

Mr. Julius C. Burrows, of Michigan, chairman of the Committee on Privileges and Elections, said:

Mr. President, it will be observed that the certificate is not in proper form. I call attention to the fact that by it the governor appoints not only to the vacancy until the next meeting of the legislature, but until the legislature shall elect. Under that certificate, if valid, and the legislature should fail to elect, Mr. Benson might hold for life. But the certificate, nevertheless, I think, is sufficient, as that portion of it which assumes to supply the vacancy "until the legislature shall elect" can be regarded as surplusage.

Mr. Benson then appeared and took the oath.

595. A Senator-elect was permitted to take the oath, although his credentials were irregular in minor particulars.—On December 21, 1905,[1] in the Senate, John.M. Gearin appeared with credentials as follows:

STATE OF OREGON, *Executive Department.*

SALEM, *December 18, 1905.*

The Governor of Oregon to John M. Gearin, of the City of Portland, State of Oregon:

Whereas on the 8th day of December, 1905, the seat of the Hon. John H. Mitchell, one of the Senators of the United States from the State of Oregon, became vacant by reason of his death; and

Whereas there has been no session of the legislature of this State at which such vacancy could be filled by the election of a Senator to succeed the said John H. Mitchell; and

Whereas it is of vital importance to the interests of the State and nation that such vacancy be filled:

Now, therefore, be it known that, reposing special trust and confidence in the capacity, integrity, and fidelity of John M. Gearin, a citizen of the State of Oregon, I, George E. Chamberlain, governor of the State of Oregon, do in the name and by the authority of said State, by these presents appoint

[1] First session Fifty-ninth Congress, Record, p. 8453.

[2] First session Fifty-ninth Congress, Record, pp. 667, 668.

and commission him, the said John M. Gearin, to be a United States Senator to fill the place made vacant by the death of the said John H. Mitchell and to occupy the same until a successor shall be duly elected.

In testimony whereof I have hereunto set my hand and caused the seal of the State to be affixed, at the city of Salem, on this 13th day of December, 1905.

GEO. E. CHAMBERLAIN, *Governor.*

By the governor:
[SEAL.]

F. I. DUNBAR, *Secretary of State.*

The credentials having been read, Mr. Julius C. Burrows, of Michigan, said:

I would suggest to the Senator that the certificate, as I understood from its reading at the desk, is defective, in that it provides that Mr. Gearin is appointed until his successor is elected. The governor has no power to make such an appointment. * * * I think under the circumstances I should object to the oath of office being administered because of the defect in the certificate. A certificate appointing a person a Senator until his successor is elected seems to me to be defective.

Mr. John C. Spooner, of Wisconsin, said:

I am very clearly of the opinion, in concurrence with the Senator from Michigan, that the last clause of this commission, "and to occupy the same until a successor shall be duly elected," is in excess of constitutional authority. It is, however, mere surplusage, for the Constitution provides how long a Senator appointed by the governor to fill a vacancy may hold the appointment. If the appointment in itself to fill a vacancy is complete and in accordance with the constitutional provision, whatever is added going to the duration of the term is utterly unnecessary, and if in violation of it is a mere matter of surplusage, not going to the validity, it seems to me, of the appointment.

We have had, I think, a similar case within my recollection. There was a vacancy—that is not disputed—occasioned by the death of Senator Mitchell, which is sought in this amendment to be filled. It is recited that the vacancy happened in a vacation while the legislature was not in session, and the governor says:

"Now, therefore, be it known that, reposing special trust and confidence in the capacity, integrity, and fidelity of John M. Gearin, a citizen of the State of Oregon, I, George E. Chamberlain, governor of the State of Oregon, do, in the name and by the authority of said State, by these presents appoint and commission him, the said John M. Gearin, to be a United States Senator to fill the place made vacant by the death of the said John H. Mitchell."

If the last clause, following that I have just read, were omitted, that, I submit to the Senator from Michigan, is a complete and valid evidence of the appointment of Mr. Gearin by the governor of Oregon, and I think that the Senate ought to disregard entirely the unnecessary and now altogether impotent words which occur at the end of the commission. I make that suggestion to my friend from Michigan.

Mr. Burrows replied:

Mr. President, I only desired to call the attention of the Senate to the defect in the certificate. Of course that portion of the certificate which declares that Mr. Gearin is appointed to fill the vacancy until his successor is elected may be regarded as surplusage, if the certificate in other particulars clearly shows that the executive of the State had the power to make the appointment.

The certificate is defective in another particular. The governor says that he appoints the person named to "fill the vacancy." He has no power to do that. The Constitution provides that the executive of the State, in such a case as the present, "may make a temporary appointment until the next meeting of the legislature, which shall then fill the vacancy." But I do not care to be hypercritical about it at all. I simply call the attention of the Senate to the defects in the certificate.

There being no further objection, Mr. Gearin was permitted to take the oath.

596. The credentials of a Member-elect indicating that he had been elected before the resignation of his predecessor took effect, objection was made and the oath was not administered until new credentials were pro-

duced.—On December 3, 1900,[1] the first day of the session, the following credentials were presented to the House:

THE STATE OF IOWA, *ss:*
TO HON. ALEXANDER MCDOWELL,

Clerk of the Howe of Representatives:

This is to certify that at an election holden on Tuesday, November 6, A. D. 1900, the following-named persons were duly elected Representatives in Congress, to represent the Congressional districts of said State herein set forth, to fill vacancies, to wit:

Walter I. Smith, of Council Bluffs, in the county of Pottawattamie, to succeed Smith McPherson, resigned on the 6th day of June, A. D. 1900.

James P. Conner, of Denison, in the county of Crawford, to succeed Jonathan P. Dolliver, resigned, to take effect on the first Monday of December, A. D. 1900.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Iowa, this 28th day of November, A. D. 1900.

LESLIE M. SHAW.

By the governor:

G. L. DOBSON, *Secretary of State.*

Mr. Joseph W. Bailey, of Texas, raised the question that so much of the credential as related to Mr. Conner's election showed that the election was held before the vacancy actually existed.

The Speaker[2] said:

This objection being made, Mr. Conner will step aside until the other gentlemen whose credentials have been read are sworn

On the succeeding day[3] Mr. William P. Hepburn, of Iowa, having called the case up, Mr. Bailey said that he would not object to the swearing in of Mr. Conner if new and proper credentials could be substituted for those presented the preceding day.

Thereupon the following was presented

UNITED STATES OF AMERICA,
STATE OF IOWA, EXECUTIVE DEPARTMENT.

TO HON. JAMES P. CONNER, greeting:

It is hereby certified that at an election holden on the 6th day of November, 1900, you were elected to the office of Representative in Congress from the Tenth Congressional district of said State for the residue of the term ending the 3d day of March, 1901.

Given at the seat of government this 27th day of November, A. D. 1900.

[SEAL.]

LESLIE M. SHAW.

By the governor:

G. L. DOBSON, *Secretary of State.*

Mr. Bailey called attention to the fact that the credential was addressed to Mr. Conner instead of to an official of the House, but stated that he would not object to this informality. The existence of the vacancy was the vital point.

Mr. Hepburn having stated that Mr. Dolliver, as soon as he had given his written resignation, had accepted another office, that of Senator, incompatible with that of Representative, Mr. Bailey declared this satisfactory evidence that a vacancy existed

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[1] Second session Fifty-sixth Congress; Journal, p. 5; Record, p. 15.

[2] David B. Henderson, of Iowa, Speaker.

[3] Journal, p. 20; Record, p. 46.

for which the governor of Iowa could issue a writ of election, and with this as part of the record had no further objection.

Mr. Conner was thereupon sworn.

597. The New York election case of Williamson v. Sickles in the Thirty-sixth Congress.

In 1859 the Clerk enrolled a Member-elect who had no regular certificate, but who presented an official statement from the State authorities showing his election.

A question as to what constitutes a "determination of the result" of an election under the terms of the law of 1851 relating to notice of contest.

The law of 1851 regulating the conduct of contests in election cases is not of absolute binding force on the House, but rather a wholesome rule not to be departed from except for cause.

When the House of Representatives met to organize on December 5, 1859, the name of Mr. Daniel E. Sickles, of New York, was among the names of the Members-elect on the Clerk's roll.

Mr. Sickles did not, however, have a regular certificate of election. The county canvassers had returned the votes in Mr. Sickles's district, as well as in two other districts as cast for "Member of Congress." It appeared that the ballots actually cast were for "Representatives in Congress." The board of State canvassers issued a statement [1] of the votes returned, which showed the election of Mr. Sickles, and declared:

> And we further certify that inasmuch as said office was not legally designated in the returns of the county canvassers of the said county of New York made to this board, we can not certify to the election of any person to the office of Representative in Congress in the said respective districts.

Mr. Sickles presented, in lieu of regular credentials, a certified copy of this statement.

Mr. Sickles's prima facie right to the seat was not challenged, either on December 5, 1859,[2] when the House assembled, or on February 1, 1860,[3] when the oath was administered to the Members-elect by the Speaker.

Mr. Sickles's final right to the seat was contested. The merits of this contest do not appear, since on January 31, 1861,[4] the Committee on Elections simply reported that the contestant had not shown sufficient grounds for disturbing the sitting Member.

But an important preliminary question arose, on which careful reports and a well-considered opinion of the House resulted.

The law of 1851 [5] provided that the contestant should, "within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice in writing" of

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[1] First session Thirty-sixth Congress, House Report No. 80, page 23.

[2] Journal, p. 4.

[3] Journal, p. 165.

[4] Second session Thirty-sixth Congress, Journal, p. 250; House Report No. 61.

[5] 9 Stat. L., p. 568.

his intention to contest. The contestant, Mr. Amor J. Williamson, did not proceed under this law, the explanation of his course being included in the following from the report of the committee:

While the votes were before the State canvassers, and before their action became known, Mr. Williamson made preparations to contest the seat in the mode pointed out in the statute of 1851. He employed counsel for that purpose, and prepared, in part, the notice of contest required by that statute. But when those canvassers published their action he was advised by his counsel that there had been no such "determination of the result of said election" as is contemplated in said act, and that until such determination was made he could not under said law serve notice upon Mr. Sickles more than Mr. Sickles upon him, for both were equally without evidence of his right to the seat from the constituted authorities of New York, and that he could not, by the authority of said act, obtain compulsory process for the attendance of witnesses, or compel them to attend and testify under the pains and penalties of perjury. He therefore abandoned further proceedings under said act, and appealed to the House at the earliest practicable moment after the organization for a commission to take testimony, believing this to be his only mode of obtaining any evidence beyond voluntary testimony. The answer of Mr. Sickles to the petition and to this application to take testimony, and also his brief in its support, are appended to this report, as is the brief of the petitioner in reply thereto.

The committee do not consider the law of 1851 as of absolute, binding force upon this House, for by the Constitution "each House shall be the judge of the elections, returns, and qualifications of its own members," and no previous House and Senate can judge for them. The committee, however, consider that act as a wholesome rule, not to be departed from except for cause. But the conclusion to which they have arrived upon this application renders it unnecessary for them to settle the question whether the action of the State canvassers was such a "determination of the result of said election" as is contemplated in that statute, so as to bring the case within its provisions. There obviously can arise cases not within the provisions of that act in which the parties must apply to the House itself for authority to take any other than voluntary testimony.

The majority of the committee therefore reported the following resolution:

Resolved, That A. J. Williamson, contesting the right of Hon. D. E. Sickles to a seat in this House as a Representative from the Third district of the State of New York, be, and he is hereby, required to serve upon the said Sickles, within ten days after the passage of this resolution, a particular statement of the grounds of said contest, and that the said Sickles be, and he is hereby, required to serve upon the said Williamson his answer thereto in twenty days thereafter; and that both parties be allowed sixty days next after the service of said answer to take testimony in support of their several allegations and denials before some justice of the supreme court of the State of New York, residing in the city of New York, but in all other respects in the manner prescribed in the act of February 19, 1851.

The minority of the committee contended that the contestant might have proceeded under the law of 1851, or the usages of parliamentary assemblies, and that the course now proposed was "illegal and unprecedented." Therefore they opposed the proposed action on four grounds:

First. That the committee is bound, by the action of the House upon the subject matter, to presume that the sitting Member had a prima facie title to a seat.

Second. That Mr. Williamson, making no objection by way of protest or otherwise to the occupancy of the seat by Mr. Sickles, or to his being sworn in, is estopped from maintaining as a reason for not giving notice of contest and proceeding with the case in obedience to the law of 1851, that the sitting Member had "no prima facie right or title to a seat," and therefore was not entitled to notice.

Third. That having entirely failed to comply with the law of Congress prescribing the necessary steps to be taken by contestants, the petitioner is, by his own default, without remedy.

Fourth. That it is not competent for the committee to recommend any action to the House which involves a violation of the law of 1851, because as a law of Congress it is obligatory alike upon the House, the committee, and the contestant; that the act relating exclusively to the initiation of the proceedings, the taking of testimony, and the preparation of the case for the decision of the House, does not infringe upon the constitutional prerogative of the House to judge of the election, return, and qualifications of its Members."

On March 20 and 21 [1] the report was debated at length in the House, the history and intent of the law of 1851 being fully considered. The fourth ground of the minority was especially combated on the ground that the constitutional power, to judge implied also the right to investigate when and how the House should please, untrammeled by law of a former Congress.

The resolution proposed by the majority was agreed to—yeas 80, nays 64.

598. The case of Williamson v. Sickles, continued.

Form of resolution providing for serving notice and taking testimony in an election case conducted in disregard of the terms of the law.

The House by resolution may delegate the appointment of a commissioner to take testimony in an election case and may prescribe the course of procedure of said commissioner.

Instance wherein witnesses in a contested election case were to be summoned by subpoenas issued by the Speaker.

On May 17, 1860,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported the following resolution, which was agreed to without division, although one Member protested that it was a violation of the law of 1851:

Resolved, That the judges of the superior court of the State of New York, residing in the city of New York, be, and they are hereby, authorized and requested to appoint and select a commissioner of the degree of counselor at law, whose duty it shall be to take the testimony in the matter of Amor J. Williamson, contesting the seat now held by Hon. Daniel E. Sickles, from the Third Congressional district of the State of New York, as provided and directed by the resolution passed by the House of Representatives on the 21st of March, 1860. It shall be the duty of the said commissioner so appointed to enter upon his duties immediately after his appointment, and, after giving five days' notice to the parties to this contest, to proceed from day to day with the examination of such witnesses as may be brought before him in support of the allegations of the contestant and certain allegations of the sitting Member until the case is closed; provided such exmaination does not extend beyond sixty days from the time of commencing the taking of such testimony. It shall be the duty of the commissioner appointed under this resolution to provide the attorneys of the parties to this action with such number of subpoenas, issued by the Speaker of this House, as they may require for the witnesses they desire to call. The said commissioner is hereby directed to take up the case from the point which it had reached at the time it was brought before the superior court on the 16th of May, 1860; and all notices given on either side are hereby declared good without further action. All witnesses must be sworn by some officer authorized by the laws of the State of New York to administer oaths. On the conclusion of the case, it shall be the duty of the commissioner hereby provided for to transmit a correct copy of the evidence, pleadings, etc., under oath, to the House of Representatives. And each party is hereby authorized to take the testimony of any witnesses resident in the State of New Jersey, before any judge of a court of

[1] First session Thirty-sixth Congress, Globe, pp. 1255, 1278–1289; Journal, p. 563; 1 Bartlett, p. 288; Rowell's Digest, p. 163.

[2] Journal, p. 850; Globe, p. 2157.

record or magistrate authorized to take depositions, resident in the State of New Jersey; and said judge or magistrate is hereby authorized to do each and all things in the premises which the commissioner hereinbefore mentioned is by this resolution authorized to do. The time for the taking of testimony under this resolution is not to commence till the day of the adjournment of the first session of this Congress, and is to extend sixty days thereafter, with the exception of such witnesses not resident of, or living in, or being about to leave, the State of New York, as the contestant may desire to subpoena and examine before said adjournment; and as to such witnesses, the commissioner or judge aforesaid, or either of them, is hereby authorized in manner aforesaid to take and forward their depositions at any time after the passage of this resolution and before the expiration of said sixty days, when application shall be made to him for that purpose by the contestant.

599. The Colorado election case of Hunt and Chilcott in the Fortieth Congress.

A governor having issued credentials in violation of law, the House honored later credentials issued by his successor.

Credentials issued by the proper officer, but defective in form and impeached by evidence, were overthrown by later credentials.

Credentials issued in violation of law to reverse the facts of the canvass of votes do not give prima facie right, although issued by the lawful officer.

Credentials should show on their face specifically that they are given to the person entitled by law to have them.

The House may give to its Elections Committee discretion to regulate the serving of notice and taking of testimony in an election case.

Form of resolution for instituting a contest to determine final right after a determination of prima facie right.

On March 5, 1867,[1] at the time of the organization of the House, conflicting credentials were presented from the Territory of Colorado, and the House referred them to the Committee on Elections, with instructions to report "at an early day as to the prima facie right to a seat."

On March 14, 1867, Mr. Glenni W. Scofield, of Pennsylvania, submitted the report of the majority of the committee.[2] The report gives the certificate of the governor of the Territory, as follows:

EXECUTIVE DEPARTMENT, COLORADO TERRITORY,
Denver, September 5, 1866.

Sir: This is to certify that at an election held August 7, 1866, in accordance with the laws of Congress and of the Territory of Colorado, for Delegate to represent said Territory in the Fortieth Congress of the United States, you were duly elected such Delegate.

In testimony whereof I have hereunto set my hand and caused the seal of the Territory of Colorado to be affixed. Done at Denver, this 5th day of September, A. D. 1866.

[SEAL.]

ALEXANDER CUMMINGS,
Govemor of Colorado Territory.

Attest:

FRANK HALL,
Secretary of Colorado Territory.

HON. A. C. HUNT,
Denver, Colorado Territory.

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[1] First session Fortieth Congress, Journal, p. 11; Globe, p. 8; 2 Bartlett, p. 164; Rowell's Digest, p. 212.

[2] Report No. 3. The views of the minority were presented by Mr. Michael C. Kerr, of Indiana.

The report goes on:

> The election laws of the Territory provide that "the secretary of the Territory, auditor, treasurer, or any two of them, in the presence of the governor, shall proceed * * * to canvass the votes given for all Territorial officers, and the governor shall give a certificate of election to the person having the highest number of votes for each office."

The certificate of the governor in favor of Mr. Hunt makes no allusion to this canvass, nor does it give any data upon which the conclusion is based. This omission, although noticeable, would not of itself have been considered by a majority of the committee fatal to the validity of the certificate. But Mr. Hunt did not rest his case upon that paper alone. He introduced Governor Cummings in its support. The governor informed the committee that on the 5th day of September a canvass of the votes cast for Delegate was had in his presence by the board of canvassers; that two of said board found that a majority of all the votes had been cast for George M. Chilcott, and that one of said board dissented from this conclusion, and that he (the governor), considering himself one of the board, agreed with the dissenting member, making a tie, whereupon he determined the election himself, and made a certificate in opposition to the conclusion of two members of the board. In addition to the governor's statement, among the papers submitted by the House is a report of the board of canvassers, signed by Frank Hall, secretary of the Territory, and Richard E. Whitsitt, auditor of the Territory, and addressed to the governor, in which they state that at the canvass held in his presence, according to law, they find that Mr. Chilcott had 3,529 votes and A. C. Hunt had 3,421 votes, by which it would appear that Mr. Chilcott was elected Delegate by 108 majority. The certificate of the governor thus appears to have been issued in violation of the laws of the Territory, in order to reverse the facts of the canvass. Under this state of facts the committee do not feel authorized to report that Mr. Hunt is entitled prima facie to a seat as Delegate.

The certificate of election presented by Mr. Chilcott is based upon the report of the board of canvassers, and is signed by Frank Hall, acting governor of the Territory; but it bears date February 5, 1867, five months subsequent to the action of Governor Cummings in the same case. The committee are of the opinion, as held in the case of Todd and Jayne, that this power, having been once exercised by the proper officer, can not be again exercised by his successor, and that therefore Mr. Chilcott was not entitled prima facie to a seat as Delegate.

The majority therefore recommended that the case be referred to the Committee on Elections, with instructions to ascertain the final right to the seat.

The minority, in their views, denied outright that Governor Cummings made the statement attributed to him in the majority report, and say that the committee could not, under the resolution of reference, have considered parol evidence. The minority argue on the issue presented:

> We submit, therefore, that the prima facie title is in A. C. Hunt. The certificate held by him is executed in the usual form by the only officer having authority to issue the same, and is attested by the proper officer. It alleges in comprehensive but apt and proper words the existence of every material fact necessary to sustain such a certificate. Its language does not admit of any other construction without a tortuous disregard of the most common and accepted meaning of words and of established rules of interpretation.

To have been "duly elected" "in accordance with the laws of Congress and of the Territory of Colorado" certainly excludes the conclusion that the recipient of such a certificate could have received less than "the highest number of votes." It is alike demanded by reason and authority that the words used shall be taken in their most common and recognized acceptation, and that every fair and reasonable inference shall be made in favor of the prima facie sufficiency of the paper, and even if the terms used were ambiguous, that such a meaning should be affixed to them as would be most suitable to the subject-matter and purpose of the certificate. Applying these rules to the case in hand, the right to the seat would seem to be very clearly in Mr. Hunt, until the contest shall have been examined on its merits.

The certificate awarded to Mr. Hunt by the governor in this case is almost identical in form with those generally given by governors of States to Representatives-elect to Congress which have always been holden to be sufficient prima facie.

It can not with legal force or propriety be insisted that such a certificate, when executed by the governor of a Territory, should contain any more extensive recitals of facts than when executed by the governor of a State. In either case its substantial and reasonable purpose is attained if it states that the holder of it is duly elected according to law. Such a certificate constitutes sufficient evidence of a valid election prima facie, at first impression, and without submitting evidence of complete title as against all men.

But it is claimed that this apparent title in Hunt is overcome by the certificate or paper already referred to, which was executed and delivered to Mr. Chilcott five months afterwards by Frank Hall, "secretary and acting governor of the Territory." How Mr. Hall, at the date of his paper, came to be acting governor does not appear. Why he, five months before, as secretary, attested the certificate and proclamation in favor of Mr. Hunt is entirely unexplained. The value of the paper must be determined by mere inspection and by comparison of it with those presented by Mr. Hunt. Thus tested it is certainly defective as evidence of title in anyone. It is issued five months after the first and is attested by no one. It is issued by the same officer who attested the first, but the inconsistency of his connection with the two acts is not explained. It is executed solely by a person or officer of whose right to assume the character of "acting governor of the Territory" this House can not take judicial notice. At the time it was executed the authority to issue a certificate of election had been formally exercised by the rightful governor of the Territory. That authority could not be again exercised in reference to the result of the same election by another officer who might, by mere accident, become temporarily entitled to act as governor. If any facts existed or came to the knowledge of the "acting governor" after the execution of the regular certificate by the governor, they may constitute valid ground of contest, and may defeat the prima facie right of Mr. Hunt to the seat, but such facts can not be examined on a mere inquiry as to prima facie title.

On March 20 [1] the report was debated at length in the House. It was explained in this debate that the statement of Governor Cummings had been made not as evidence of a witness, but as an admission while he was arguing as counsel, but even on this view of his statement there was not entire unanimity on the part of the committee. It was also stated in debate and not denied that among the papers referred with the credentials was one giving the official returns from the several counties, which sustained the report of the canvassing board and showed the election of Mr. Chilcott on the face of the returns.

In support of the argument that Mr. Chilcott had the prima facie right to the seat it was urged that the certificate should show that the governor had acted in conformity to law in giving it, and the law directed the governor to give the certificate to "the person having the highest number of votes," as found by the board of canvassers. The certificate did not show this. Taken together with the admissions made and the papers filed with it, it was evidently not evidence of prima facie right. If Governor Cummings had given a legal and valid certificate he would have exhausted the function and another might not be issued. But the governor did

[1] Globe, pp. 225–233; Journal, pp. 73, 74.

not give such a certificate, and so the acting governor at a later date might issue a certificate that would entitle Mr. Chilcott to the seat by prima facie right.

Therefore it was moved that the proposition of the committee be amended so as to seat Mr. Chilcott pending examination as to final right. This amendment was agreed to—yeas 91, nays 36. The substitute of the minority was then disagreed to, and then the original resolution as amended was agreed to, and Mr. Chilcott was sworn in.

So it was—

Resolved, That the papers and evidence relating to the right of A. C. Hunt and George M. Chilcott to a seat in the Fortieth Congress as a Delegate from the Territory of Colorado be referred to the Committee of Elections, with instructions to report which, if either, of said claimants is entitled thereto; and that the committee have power to require the service of such notices and grant such time for taking further evidence as they may deem proper.

and that pending the action of the committee and the House thereon, George M. Chilcott be sworn in as the sitting Delegate from the Territory of Colorado.

Evidence was taken in the case,[1] but no report was made on the merits. On July 25, 1868,[2] the House passed a resolution reimbursing contestant for his expenses.

600. The election case of Whitmore v. Herndon, from Texas, in the Forty-second Congress.

A question arising as to the sufficiency of papers purporting to be credentials, the House had the papers examined by a committee before permitting the Member-elect to be sworn.

The House by resolution may modify the law as to the times and places of taking the testimony in contested election cases.

On December 4, 1871,[3] after the roll had been called by States and the presence of a quorum had been ascertained, the credentials of W. S. Herndon, claiming a seat from the State of Texas, were presented, and referred to the Committee of Elections, Mr. Herndon not being sworn in.

On December 12,[4] on report of the committee that he was entitled to the seat on the strength of the documents presented, the House ordered Mr. Herndon to be sworn in, and he accordingly qualified.

On December 18, 1871,[5] Mr. George W. McCrary, of Iowa, submitted from the Committee of Elections a resolution, which was agreed to in the following amended form:

Resolved, That the sixty days which the law allows for taking testimony in the contested election case of G. W. Whitmore *v.* W. S. Herndon, from the first district of Texas, shall commence on the 1st day of January, 1872.

Resolved, That either party to said contest be authorized to take the testimony of any witnesses who may be found in the District of Columbia, at the city of Washington, before any officer authorized by law to take depositions therein, within sixty days after the passage of this resolution, upon three days" notice to the opposing party; no mileage to be allowed to such witnesses.

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[1] See Journal, second session Fortieth Congress, p. 124.

[2] Journal, second session, p 1186; Globe, pp. 1901, 4471.

[3] Second session Forty-second Congress, Journal, p. 8; Globe, p. 9. The questions arising as to these credentials were the same as set forth in the case of W. T. Clark. See section 601 of this work.

[4] Journal p. 61; Globe, p. 70.

[5] Second session Forty-second Congress, Journal, p. 89; Globe, p. 199.

On May 24, 1872,[1] Mr. George F. Hoar, of Massachusetts, from the Committee on Elections, submitted this resolution, which was agreed to without division:

Resolved, That William S. Herndon is entitled to retain the seat he now holds as a Member from the First Congressional district of Texas.

601. The Texas election case of Giddings v. Clarke in the Forty-second Congress.

A person bearing credentials which, on their face, showed that the governor issuing them was doubtful as to who was actually elected, was seated by the House, there being provisions of law to justify the governor's act.

Form of resolution seating a person on prima facie showing without prejudice to the rights of a contestant.

On December 4, 1871,[2] after the roll had been called and the presence of a quorum had been announced, several Members-elect, whose credentials were in regular form, were sworn in. Then Mr. George W. McCrary, of Iowa, presented the credentials of Mr. William T. Clark, of Texas, which he stated were not in regular form, and which were as follows:

GOVERNOR'S OFFICE, *Austin, November 15, 1871.*

This is to certify that, on comparison of the returns of votes cast at an election held in the Third Congressional district of the State of Texas, on the 3d, 4th, 5th, and 6th of October, A. D. 1871, provided for by a joint resolution of the legislature of said State of Texas, approved May 2, 1871, I find that the Hon. W. T. Clarke was duly elected to represent the said Congressional district of the State of Texas in the Congress of the United States for the term commencing on the 4th day of March, A. D. 1871, and ending on March 3, 1873.

In giving this certificate I wish to call attention to the attached certified statement of the vote cast in the Third district as returned, with grounds for rejecting certain returns. This is explanatory of my reasons for giving the foregoing certificate of election. According to my opinion, the numerous irregularities and instances of fraud and violence during the election in the Third district, reported and proved to my satisfaction, would rather warrant a new election than the giving of a certificate to either party. I have felt constrained by my interpretation of the provisions of the State law on the subject of elections to reject many returns, and would have thought it more just to regard the election as a nullity, yet the act of Congress of May 31, 1870,[3] section 22, seems to require that I should give a certificate of election to one of the candidates.

In testimony whereof I have caused the great seal of the State to be affixed, at the city of Austin, the date herein first above written.

[SEAL.]

EDWARD J. DAVIS, *Governor.*

By the governor:

JE. OLDRIGHT,

Acting Secretary of State.

The credentials were referred to the Committee of Elections, and Mr. Clarke was not sworn in.

On December 18, 1871,[4] Mr. George F. Hoar, of Massachusetts, submitted the report of the committee. This report stated the conditions of the law as follows:

It will be seen that the laws of Texas, under which the election for Members of the Forty-second Congress was held, provide that the judges of election at each poll or voting place (see. 33) shall count

[1] Journal, p. 944; Globe, p. 3816.

[2] Second session Forty-second Congress, Journal, p. 8; Globe, p. 9.

[3] 16 Stat. L., pp. 145, 146.

[4] House Report No. 2; Smith, p. 6; Rowell's Digest, p. 263.

the ballots, make a list of the names of persons and officers voted for, the number of votes for each, the number of ballots in the box, the number of ballots rejected, and the reasons therefor. All this is to be done "immediately after the close of the polls." This statement is to be made out in triplicate, signed and sworn to, one copy sent by mail to the secretary of state, another copy sent to the governor, and a third retained by the registrar.

The twenty-first section provides that if there be any disturbance, intimidation, or corruption which prevent or tend to prevent a free and peaceable election, the judges or registrar shall make a statement, under oath, thereof, corroborated by the oaths of three citizens, and transmit the same to the governor. Section 34 requires the secretary of state to make a table containing an alphabetical list of the counties, with columns for the names of candidates and the number of votes; and on the sixteenth day after the close of the election, in the presence of the governor and the attorney-general, to open the returns and enter on the table the number of votes given for the candidates, respectively, and then put the returns back in the envelope, and seal and file them away.

The returning officers are to compile the statements first from all places where there has been a fair, free, and peaceable registration and election. Then if there has been received any statement from any judge or registrar of violence, intimidation, or corruption, as above stated, they are to see whether these, if proved, would affect the result. If they would not, they are to proceed to canvass and compile the returns from such voting place as if no such statement had been made. If they would, the returning officers are to examine further testimony, with power to send for persons and papers, and, whenever such illegalities are shown to have taken place at any voting place so as materially to affect the result, then the said returning officers shall not canvass or compile the statement of the votes at such poll or voting place, but shall exclude it from their returns. The secretary may also employ clerks to compile the returns for a length of time not to exceed twenty days.

The foregoing provisions are all contained in a statute entitled "An act to provide for the mode and manner of conducting elections, making returns, and for the protection and purity of the ballot box." They do not make, in terms, any distinction between different classes of officers or purport to be limited in their application to State officers exclusively, and they are the only provisions for forwarding returns to the secretary of state or for any canvass or compilation which shall ascertain the result. But section 23 provides that—

"As soon as possible after the expiration of the time of taking the returns of the election for Representatives in Congress, a certificate of the returns of the election for such Representatives shall be entered on record by the secretary of state and signed by the governor, and a copy thereof, subscribed by said officers, shall be delivered to the person so elected and another copy transmitted to the House of Representatives of the Congress of the United States."

The minority claimed that this paragraph above quoted was the only law of Texas relating to the duties and power of the governor in regard to election returns for Members of Congress, and that the provision of law relating to rejection of returns by returning officers in case of violence, intimidation, corruption, etc., applied only to returns of election of State officers. On this question of fact the case to a considerable extent hinged. The majority could not say affirmatively that the governor had rejected the returns referred to in the certificate in a legal way after they had been duly certified up; but in the debate a communication from the secretary of state of Texas was presented, showing that whatever rejections were made were in strict conformity to all legal requirements.

The majority of the committee find Mr. Clarke's credentials satisfactory:

It is signed by the governor and secretary, declares Mr. Clarke to be duly elected, states that it is a document on record in the secretary's office, and contains the tabulated statement of returns required by law. It is true it does not state that the attorney-general was present when the local returns were opened, and it is not required to state this by the law. The certificate of the returns is all that is to go on the record. It is true also that it shows that some local returns are rejected; but these are all rejected for reasons which, by the express provisions of law, it was made the duty of these officers to

weigh and act upon, except in the case of Brazos County, which does not affect the result. It is true also that it does not appear that, in investigating the allegations of violence and intimidation, the State officers proceeded in the mode pointed out by the law; but it does not appear that they did not. It is not necessary that they should record or certify how they proceeded. The maxim omnia rite acta esse presumuntur is clearly applicable in a case of this sort. Few, if any, of the credentials of the Members of the House show how the officers who certified them proceeded under the State laws in ascertaining the fact which he declares. It is enough for a prima facie case if the certificate came from the proper officer of the State, and clearly shows that the person claiming under it has been adjudged to be duly elected by the official or board on whom the law of the State has imposed the duty of ascertaining and declaring the result.

We therefore recommend the adoption of the following resolution:

Resolved, That W. T. Clarke has the prima facie right to a seat as Representative from the Third Congressional district of the State of Texas, and is entitled to take the oath of office as a Member of this House, without prejudice to the right of any person claiming to have been elected thereto to contest his right to said seat upon the merits.

The minority views, presented by Mr. E.Y. Rice, of Illinois, thus attacked the credentials:

Upon inspection it also appears that the same contains qualifications and recitals that go very far to lessen its character, if not to destroy its validity altogether as prima facie evidence of title to a seat in this House by W. T. Clarke.

The conclusion reached by Governor Davis, as appears from the closing lines of the certificate in question, was not owing so much to the fact that he believed Mr. Clarke, or any other candidate, to have been duly and legally elected, as to the fact that he was impressed with the belief that he was compelled by the twenty-second section of the act of Congress of May 3, 1870, to give a certificate of election to one of the candidates.

This certificate also refers to (and we hold adopts as a part thereof) a certified statement of the vote cast in the Third district of the State of Texas for Representative in the Forty-second Congress for said district. A copy of said certificate of election, certified statement of the votes returned, and "remarks" showing the rejection of votes returned, and the reasons or grounds of rejection, is herewith submitted as a part of this report.

It appears by the vote returned, as shown by the certified statement referred to and verified by the governor, that if the whole number of votes polled for W. T. Clarke were counted for him, and the whole number polled for D.C. Giddings were counted for him, the majority for Mr. Giddings would be 730 votes.

Mr. Giddings insists that the evidence furnished by the documents or certificates referred to the committee shows that he was in fact duly elected, and that he is entitled to take his seat as a Member of this House for the Third district of the State of Texas. If the votes are to be counted for the respective candidates as they were returned to the secretary of state by the boards of election or registrars, then Mr. Giddings is clearly entitled to the seat for said district. But if, on the contrary, the governor of the State of Texas, after the votes for Member of Congress for said district were returned to him, had lawful power and authority to reject all the votes which he states he did reject, then Mr. Clarke is entitled to be admitted to his seat, if there was in fact a lawful and valid election held in said Third district of the State of Texas at the time stated in said certificate.

This brings us to the question, What is the legal effect of a certificate stating that the party to whom it is given was duly elected to an office, where the certificate recites or adopts by reference a state of facts which shows that the holder was not elected? Clearly the facts must stand, and the conclusions which the facts contradict must fall. If the facts show, as we think they do, that Mr. Giddings was elected, the statement that Mr. Clarke was duly elected can not be accepted. The question arises as to the extent of the authority and power of the governor to reject the returns of the election as made to him or the secretary of state. This is to be ascertained by an examination of the election law of the State of Texas. Upon a careful examination of the same we fail to find, according to our views of correct interpretation, any such power.

The report was debated at length on January 10, 1872,[1] and on that day the question was taken on an amendment proposing to recommit the report, with instruction to report on the merits of the case. This amendment was disagreed to—yeas 81, nays 101.

The resolution of the majority was then agreed to—yeas 102, nays 78.

Thereupon Mr. Clarke appeared and took the oath.

602. The case of Giddings v. Clarke, continued.

The House by resolution sometimes fixes the time of taking testimony, specifies the kind of testimony to be taken, and the places where it may be taken.

The sitting Member should be allowed additional time to take testimony only when the clearest evidence and strongest reasons justify the concession.

In asking for extension of time to take testimony in an election case, affidavits should state facts showing that with proper diligence it has been impossible to take the testimony.

Affidavits filed with a request for time to take additional testimony in an election case must state the names of the witnesses and the particular facts to be proven by them.

On January 12[2] Mr. George W. McCrary, of Iowa, reported from the Committee on Elections, and the House agreed to the following:

Resolved, That in the contested election case of Giddings *v.* Clarke, from the Third Congressional district of Texas, the sixty days allowed by law in which to take testimony shall commence on the 1st day of February next and shall close sixty days thereafter. That the testimony shall be confined to the issues presented by the pleadings, and may be taken before any officer authorized by law to take depositions in the State of Texas. Either party may take testimony in the District of Columbia, before any officer authorized, giving the opposite party or his attorney three days' notice of time and place: *Provided,* No mileage shall be paid any such witnesses.

On May 7, 1872,[3] Mr. McCrary, from the committee, presented the report in the case of Giddings *v.* Clarke. Before proceeding to the merits a preliminary question was disposed of. Under the above-written order, the report says:

The contestant proceeded with diligence to take testimony within the time thus fixed, but the sitting Member has failed to take any testimony in the manner provided by law, and the order of the House to sustain the allegations of the answer or to rebut those of the notice. The time for taking testimony having expired on the Ist day of April, the sitting Member, on the 24th of April, came before your committee with a motion for an extension of time in which to take testimony on his behalf. This motion was based upon the affidavits of the sitting Member and numerous other persons. These affidavits state in substance and in general terms that a combination was formed among the friends of contestant to indict the officers of election in the several counties upon charges of a violation of the election laws, and thus to inaugurate a system of persecution against the sitting Member's friends and witnesses and deter the latter from testifying.

They also state that, in pursuance of this combination, indictments were found against the governor and secretary of the State of Texas, and against some of the election officers and others in the counties of Hill, Navarro, Grimes, Harris, and Washington. It is averred that the finding of these indictments

[1] Journal, p. 135; Globe, pp. 340–349.

[2] Journal, p. 145; Globe, pp. 375, 376.

[3] House Report No. 65; Smith, p. 91; Rowell's Digest, p. 279.

produced such a feeling of alarm and danger in the district that it was impossible to take testimony on behalf of the sitting Member, but no overt act of violence is mentioned. The only specific fact given is the finding of the indictments aforesaid. The affidavits are exceedingly general in their terms, and, instead of stating facts, deal largely in the opinions or conclusions of the affiants.

After hearing arguments of counsel and carefully considering the question, your committee came unanimously to the conclusion that no further time ought to be granted to the sitting Member for taking testimony, and as this decision is important in its bearing upon this case and as a precedent for future cases, some of the principal reasons for it will now be stated.

The first reason given was that, as the one asking the extension was the sitting Member, to grant it would be practically to decide the case in his favor, since it would continue him in the enjoyments and emoluments of the office for the greater portion of the term. The report says:

It does not follow from these considerations that a sitting Member can in no case be allowed an extension after the time allowed by law for taking testimony expires, but your committee think it does follow that no such extension should ever be granted to a sitting Member unless it clearly appears that by the exercise of great diligence he has been unable to procure his testimony, and that he is able, if an extension be granted, to obtain such material evidence as will establish his right to the seat, or that by reason of the fault or misconduct of the contestant he has been unable to prepare his case.

The other reasons related to the sufficiency of sitting Member's affidavits in support of his request. They did not state facts from which it could reasonably be inferred that the sitting Member had been unable with proper diligence to take testimony; and furthermore:

The affidavits relied upon are fatally defective in this, that they do not state the names of the witnesses whose testimony is wanted nor the particular facts which can be proven by their testimony.

603. The case of Giddings v. Clarke, continued.

An election officer who was removed but not notified of the fact, and whose successor failed to qualify, was a de facto officer, and returns signed by him were not properly rejected.

There being testimony showing the vote of a precinct, it is not material whether or not the returns are properly certified.

Where a statute fixes a penalty for marking a ballot and does not require its rejection, the ballot should not be rejected.

As to the case on its merits the report discusses several features of the contest:

1. As to a question of rejecting certain returns because the polls had been presided over by one not legally an election officer, the report says:

The vote of this county was rejected because, as stated in the governor's certificate, "no official returns were received." It is manifest, however, that something in the character of returns must have been received, because the number of votes cast for each candidate is stated in the certificate. Wherein the returns were, in the judgment of the board, fatally defective, does not appear from the certificate. It does appear, however, from the evidence, that John A. Biffle, who was registrar of Bosque County, and who conducted the registration, was removed shortly prior to the election, and one Thomas Ford appointed in his place; but that the former was not notified of his removal, and continued to act, while the latter failed to qualify, and made no attempt to discharge the duties of the office. It seems probable that the only objection to the returns was, that they were certified by Biffle, and not by Ford. If so, the defect was not fatal, because the former was certainly acting as registrar under color of authority, and was at least an officer de facto, whose official acts affecting third parties and the public must be held valid. But, however this may be, the proof shows that the election was legally held, and that contestant received 457 votes, and the sitting Member 77 votes. If the return was uncertified, it is competent to show by other evidence what the vote was.

After quoting what had been said in the report in the case of McKenzie *v.* Braxton, the report continues:

In relation to Bosque County, we have the uncontradicted testimony of the officers who conducted the election, showing what the result in fact was; and it is therefore not material to determine whether the returns were properly and regularly certified or not. The vote of this county must be received.

2. As to certain distinguishing marks on ballots the report says:

The vote of this county was rejected by the board, and the reasons for its rejection are thus stated in the certificate:

"Rejected.—The tickets were marked with numbers, contrary to provisions of section 10, chapter 78, General Laws, fall session twelfth legislature, 1870, thereby operating as a scrutiny upon the votes and a restraint upon the freedom of voters. Further, that 49 persons of foreign birth had been permitted to register and vote without legal proof of naturalization."

By reference to the statute here referred to it will be seen that it is made a misdemeanor for any judge of election to place any number or mark upon the ticket of any voter; but it is not declared that the vote of a legally qualified voter shall be rejected because his ballot is marked by the judges. We should not be inclined to put a construction upon this statute which would enable an officer of election to destroy the effect of a ballot cast in good faith by a legal voter, by placing a number or mark upon it. A ballot may be thus marked or numbered without the knowledge or consent of the voter, and it would be manifestly unjust that he should in this way be deprived of his vote.

We think it plain that inasmuch as the statute affixes a penalty for marking a ballot and does not expressly declare that a marked ballot shall be thrown out, the board erred in rejecting the vote of this county upon this ground.

On this point also the report in the case of McKenzie *v.* Braxton is cited.

604. The case of Giddings v. Clarke, continued.

Although excitement and alarm prevailed in a county with the presence of an armed force in the neighborhood of the polls, the committee did not recommend the rejection or correction of the vote.

Instance wherein the person seated on prima facie showing was unseated on examination of final right.

Instance wherein the House seated a contestant belonging to the minority party, unseating a Member of the majority.

3. As to alleged intimidation, for which the vote of Limestone County had been rejected by the State officials, the report, while not dwelling with care on this point, says:

We are satisfied, however, that a large part of the vote of Limestone County was not cast. The colored voters generally failed to vote, so that only 28 votes were cast for Clarke to 1,153 for Giddings. That a state of excitement and fear existed in this county about the time of the election is clear. A collision occurred between some colored policemen and certain white men, which resulted in the death of one of the latter and the wounding of one of the former. This produced great excitement, and was followed by a general uprising and arming of both whites and blacks. On the day of election the town where the election was held was occupied by an armed force under command of one Captain Richardson. Pickets were stationed on all the roads leading into town, and persons coming in to vote were obliged to obtain a pass from the military authorities. Although the witnesses say that all voters were permitied to come and go in peace, and that the freedmen were urged to vote, yet it is clear that they abstained from doing so for reasons which most men would consider good and sufficient.

4. In Washington County questions arose as to the use of two ballot boxes, but they did not require to be settled, since a decision either to reject or retain the votes of the two boxes would be fatal to the case of sitting Member.

On the whole, as a result of their reasoning, the committee found that contestant was elected, and reported resolutions unseating sitting Member and seating contestant.

The report was debated on May 13,[1] when the resolutions were agreed to without division.

Mr. Giddings thereupon appeared and took the oath.[2]

605. The Arkansas election case of Boles v. Edwards in the Forty-second Congress.

Credentials bearing on their face evidence that they were not issued in accordance with the requirements of law, the Clerk declined to enroll the bearer.

The House sometimes gives prima facie effect to credentials which are so far impeached on their face that the Clerk does not feel authorized, under the law governing his action, to enroll the bearer.

On March 4, 1871,[3] at the organization of the House, the Clerk[4] did not put on the roll of Members-elect any name for the Third district of Arkansas, as the certificate bore upon its face evidence that it was not issued within the time prescribed by law and as there was serious doubt whether the officer who executed it had at that time the right to do so.

On March 7[5] the House agreed to this resolution:

Resolved, That the papers and credentials of Hon. John Edwards and the certified papers and returns presented to the House of Representatives by Hon. Thomas Boles, each claiming to be elected to the Forty-second Congress from the Third district of Arkansas, be referred to the Committee of Elections to be hereafter appointed, with instructions to report to the House which, if either, of said claimants is entitled to a seat in the House of Representatives from the said Third district of Arkansas.

On March 22[6] Mr. Luke P. Poland, of Vermont, from the Committee of Elections, submitted the following resolution, which was agreed to:

Resolved, That John Edwards, holding a regular certificate of election as the Representative from the Third Congressional district of Arkansas, is entitled to be sworn in as the sitting Member from said district, subject to the determination of the contest made against his right thereto by Thomas Boles.

606. The case of Boles v. Edwards, continued.

Parties should be held to a rigid rule of diligence under the law for taking testimony in election cases, and no extension of time should be granted where this rule is violated.

Both parties to an election contest may take their testimony at the same time before different officers.

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[1] Journal, p. 852; Globe, pp. 3384, 3385.

[2] It may be noticed that Mr. Clark, who was unseated, was a member of the majority party in the House, while Mx. Giddings, who was seated, was a member of the party in the minority.

[3] First session Forty-second Congress, Journal, p. 7; Globe, p. 6.

[4] Edward McPherson, of Pennsylvania, Clerk.

[5] Journal, p. 15; Globe, p. 16.

[6] Journal, p. 100; Globe, p. 229.

On December 20, 1871,[1] Mr. G. W. Hazelton, of Wisconsin, presented a report from the Committee of Elections, in response to a request from Mr. Edwards, the sitting Member, that the time for taking testimony be extended:

At the organization of the Forty-second Congress the name of neither of the parties to this contest was entered by the Clerk on the rolls of the House, and the question which of the parties was entitled prima facie to the seat came before the committee at the first session of the present Congress in April last.

After argument and consideration of the question the committee resolved in favor of the respondent, and, their report being adopted by the House, the said respondent was thereupon, and on the 21st day of March, sworn in and took his seat.

On the 17th day of April thereafter the answer of respondent to the notice of contest was served on contestant. The law of 1851, section 22, provides that the testimony taken by the parties, or either of them, shall be confined to the proof or disproof of the facts alleged or denied in the notice and answer, and that the same shall be taken within sixty days from the time of service of the answer, unless the House shall, in its discretion, allow supplementary evidence to be taken after the expiration of said sixty days.

The respondent introduced a resolution in the House on the 5th day of April last, thirteen days before his answer was served and before he could well have known that the time allowed by law for taking testimony would be insufficient, asking that such time be extended sixty days beyond the limit fixed by law. This resolution was referred to the committee, but no action was taken on it. The application is now made by the respondent, which, if granted, extends the time of taking testimony sixty days from the adoption of the resolution by the House.

In his affidavit, upon which he predicates the application, the respondent alleges "that the contestant occupied the whole of the time allowed by law for taking testimony and that he was compelled, in looking after his own interest in the case, to attend the taking of said testimony of the contestant and has had no time or opportunity to take any testimony in his own behalf," and on this ground alone he rests his application.

The affidavits of the contestant and of Joseph Brooks and James L. Hodges, per contra, show that the respondent was not present during the taking of contestant's testimony but once, and then only for a few minutes.

The law, moreover, is well settled that both of the parties may proceed with the taking of their testimony at the same time, before different officers.

Up to this time the sitting Member has not taken any testimony whatever, nor does it appear that he has taken a single step in that direction. It is difficult to see upon what ground the House can grant the respondent's application made under these circumstances.

To say nothing of the terms of the law already quoted touching the extending of the time fixed to allow supplementary evidence, which clearly relates to cases in which the applicant has taken some evidence—that is to say, has made some use of the time given him—the policy of the House has been adverse to granting extensions. Procrastination in these cases diminishes the object of the investigation and cheapens the value of the final decision. The law is intended to furnish ample opportunity for taking testimony. Parties should be held to a rigid rule of diligence under it, and no extension ought to be allowed where there is reason to believe that, had the applicant brought himself within such rule, there would have been no occasion for the application.

The case of Vallandigham *v.* Campbell, in the Thirty-fifth Congress, and the case of Carrigan *v.* Thayer, in the Thirty-eighth Congress, are referred to in support of the action of the committee in this case.

607. The case of Boles v. Edwards, continued.

Instance wherein the House referred to an elections committee considering a particular case a report of a joint committee incidentally referring to said case.

[1] House Report No. 3, second session Forty-second Congress; Smith, p. 18; Rowell's Digest, p. 264.

A joint committee having taken testimony which incidentally related to the right of a Member to his seat, the same was reported to the House.

On January 9, 1872,[1] Mr. Luke P. Poland, of Vermont, from the Joint Select Committee on the Insurrectionary States, submitted a report, in the course of which was given the testimony of one Edward Wheeler, who thus explained the indictment of Governor Clayton, of Arkansas, by a grand jury:

It was claimed that Governor Clayton had violated certain sections of the enforcement act in giving the certificate of election to General Edwards, when the returns, as exhibited to us by the secretary of state, showed that Judge Boles had been elected. General Edwards presented a copy of his certificate of election, and of the proclamation of the governor, stating that, according to the returns on file in the office of the secretary of state, General Edwards had been elected. But the returns, as exhibited to us, showed that Judge Boles was elected by some 2,130 votes, I think it was, on the full vote, counting the votes at both polls. There were allegations of fraud on both sides. But giving the governor the benefit of every doubt, the least majority for Judge Boles, that we could figure out, was some 800 or 900; I forget the exact figures. That was according to the returns shown to us, and upon that showing the indictment was found.

The committee therefore reported the following:

The testimony of these witnesses tends to impeach the official character and conduct of a Member of the United States Senate from the State of Arkansas, and also to affect the right of a Member of the House of Representatives from that State to retain his seat in the House. Other evidence of the same character was offered, and one of the gentlemen affected by this testimony claimed the right to bring witnesses before the committee to contradict or explain the same. The committee, however, upon consideration, decided that the subject-matter to which said testimony related did not come within the limits of the investigation they were directed to make, and therefore declined to prosecute the inquiry any further, discharging a witness who had been subpoenaed and was then awaiting an examination.

The joint select committee, pursuing what they deemed to be the proper parliamentary course, at a meeting on December 21, 1871, adopted the following resolution:

"Resolved, That the committee report the testimony taken before the committee, affecting Senator Clayton and Mr. Edwards, a Representative from Arkansas, to the Senate and House of Representatives, with a recommendation that each House take such action as it may deem proper."

Agreeably to this resolution of said joint select committee, the undersigned, the chairman on the part of the Senate, and the chairman on the part of the House of Representatives, beg leave to submit the testimony hereto annexed, of Edward Wheeler and William G. Whipple, both of the State of Arkansas, said Wheeler and Whipple having been the only witnesses from that State who were examined by the committee, to the Senate and House of Representatives respectively, for such action as each House may deem advisable.

This report was at once referred to the Committee of Elections.[2]

608. The case of Boles v. Edwards, continued.

The Elections Committee declined to consider as evidence certain official documents of a State submitted without authority from the House and not decisions in a proceeding between the parties to the pending contest.

In an election case the decision of a State supreme court in a cause to which the contestants were not parties was not received as evidence.

An opinion of an Elections Committee that the House may not delegate to another tribunal its constitutional duty of judging the elections of its own Members.

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[1] House Report No. 5 Smith, p. 26.

[2] Journal, p. 127; Globe, p. 321.

On January 19,[1] a resolution was presented proposing to allow sitting Member five days in which to introduce as evidence the official proceedings of the legislature, supreme court, and executive of the State of Arkansas. This resolution was antagonized by the members of the Elections Committee, who urged that sitting Member was entitled to no extension, and that the evidence would not be pertinent if presented. An amendment declaring that the sitting Member was not entitled to further time was agreed to—yeas 129, nays, 46. The resolution as amended was then agreed to.

On January 30, 1872,[2] Mr. Hazleton presented the report of the committee on the merits of the case.

No evidence whatever is presented by the respondent as to any irregularities or pretended irregularities outside of Pulaski County; nor were any allegations of such irregularities made by respondent in his oral argument before committee.

The respondent did, however, present to the committee and read in evidence, for what they might be deemed worth, as bearing upon the result of the vote in Pulaski County, a report of a "joint" select committee appointed by the senate and house of representatives of Arkansas to investigate election frauds in Pulaski County; and a decision of the supreme court of Arkansas in a proceeding on the part of Howard et al. *v.* McDiarmid, county clerk of Pulaski County, "praying for a mandamus against said McDiarmid to compel him to certify certain election returns to the secretary of state."

It seems hardly necessary to say that neither of these documents were regarded as evidence by the committee, or entitled to consideration in disposing of the case.

The legislative report is in no sense a judicial determination. It would not be recognized as evidence even in any court of justice. It is simply the views of certain members of the legislature of Arkansas upon the question submitted to them by the legislature.

But even if it were entitled to rank as a judicial determination, it could not be evidence in this case

First. Because it is not a decision in a proceeding between these parties. They had no hand in creating the committee, and can not be affected by its acts; and

Second. The House being made by the Constitution the judge of the election returns and qualifications of its Members, can not delegate its authority to some other tribunal, and discharge by proxy a solemn duty which the Constitution imposes on the House.

For like reasons the decision of the supreme court of Arkansas can not be regarded as evidence.

The case is, therefore, left to stand on the proofs submitted by the contestant.

Outside of Pulaski County the contestant has a majority of 2 over the respondent.

In Pulaski County the majority for contestant is 2,151, making a total majority for contestant in the district of 2,153.

It may not be improper to remark that upon the theory of the respondent, that the documents above mentioned are evidence, and giving him the full benefit of them as testimony, the result is not changed.

It makes no difference whatever to the sitting Member whether the committee take one view or another of the "evidence" submitted by him. The contestant was elected and is entitled to the seat in this House as the Member from the Third district of the State of Arkansas in the Forty-second Congress.

The committee have instructed the undersigned to further say that the testimony taken before the joint committee to investigate the affairs of the South, and referred to this committee on the 9th day of the present month, has been examined, and that in the judgment of the committee it contains nothing reflecting on the character of any Member of the House; and the committee ask to be discharged from the further consideration of such testimony.

The committee ask the adoption of the following resolution:

Resolved, That Thomas Boles is entitled to the seat in the Forty-second Congress as Representative from the Third district of the State of Arkansas now occupied by John Edwards.

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[1] Journal, p. 186; Globe, pp. 471–476.

[2] House Report No. 10; Smith, p. 58.

On February 9[1] the House considered the report, and after debate, which consisted principally of a speech by sitting Member, the resolution reported by the committee was agreed to unanimously.

Mr. Boles was thereupon sworn in.[2]

609. The Indiana election case of Shanks v. Neff in the Forty-third Congress.

Credentials which, on their face, implied that the one having prima facie right did not have the final right were not honored either by the Clerk or the House.

On December 1, 1873,[3] at the organization of the House, the Clerk announced that the paper issued by the governor of Indiana for the Ninth district could not be accepted as a credential within the meaning of the law, and therefore that neither of the claimants was enrolled.

On the same day the paper of the governor was read in the House.[4] It was in due form, certified by the secretary of state under seal, and set forth that the official returns of the several counties showed that John E. Neff had 14 votes more in the district than John P. C. Shanks, and continued:

"Now if, in the judgment of the House of Representatives of the United States the said certificates of election of the said clerks" of the several counties "shall be conclusive evidence of the facts herein stated, so as to preclude either the secretary of state or the governor of Indiana from making inquiry into the truth thereof, then, and in that case, I desire that this instrument shall be considered and taken to be a certificate of the election of the said John E. Neff."

The paper then goes on to state that if the said certificate should not be conclusive evidence so as to preclude the inquiry, then "I desire that this instrument shall be considered or taken to be the certificate of the election of the said John P. C. Shanks to the said office, I being satisfied that the said" Shanks in point of fact received a majority of the votes.

The evidence on which he based this he stated to be "an affidavit of the inspectors, judges, and clerks of the election * * * in and for the township of Wabash * * * that forty-seven ballots were voted at said precinct at said election which, after having been received and placed in the ballot box, upon the counting out of the votes were rejected and not counted in the returns of said election for the reason that said ballots were headed on the top of the face thereof with the words 'Republican ticket,'" and that these tickets contained votes for Mr. Shanks. The governor further expresses the opinion that the rejection was illegal.

Mr. George W. McCrary, of Iowa, proposed this resolution:

Resolved, That the credentials and papers on file in the Clerk's office concerning the election of a Representative in this House from the Ninth Congressional district of Indiana be referred to the Committee of Elections, when appointed, with instructions to report at an early day.

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[1] Journal, p. 314; Globe, pp. 934–938.

[2] Both contestant and sitting Member belonged to the majority party in the House.

[3] First session Forty-third Congress, Record, p. 5.

[4] Record, p. 9.

It was urged that the name of Mr. Neff should be placed on the roll as having the prima facie right to the seat, but the House by a vote of yeas 176, nays 69, agreed to the resolution presented by Mr. McCrary.[1]

On December 3[2] testimony in the case was referred to the committee.

On December 8[3] Mr. H. Boardman Smith, of New York, reported the following resolution:

Resolved, That John P. C. Shanks is entitled to a seat in this House as a Representative in the Forty-third Congress from the Ninth Congressional district of Indiana.

Mr. Smith stated that there had never been any serious question except as to the prima facie right. The resolution of the House referred the case on the merits, and that case was clear to the committee.

The resolution was then agreed to without division.

Mr. Shanks then appeared and took the oath.

610. An instance wherein the House questioned credentials borne by a Delegate-elect who himself had signed them as governor.—On December 11, 1865,[4] Mr. James M. Ashley, of Ohio, presented the petition of Charles D. Poston, asking to be admitted as Delegate from Arizona, which was referred to the Committee of Elections.

On January 17, 1866,[5] Mr. James G. Blaine, of Maine, presented the credentials of John N. Goodwin as Delegate from Arizona. Mr. Goodwin does not appear on the roll with the other Delegates at the time of the organization of the House. It appears from the statement of Mr. Blaine that at first Mr. Goodwin had presented credentials signed "by the governor of the Territory having himself the highest number of votes in the election." There being evidently same question, Mr. Goodwin presented credentials signed by the secretary of the Territory as acting governor. On these credentials Mr. Goodwin was sworn in.

On July 9[6] the Committee on Elections was discharged from consideration of the case, no notice of contest or testimony having been filed before the committee.

611. In the Senate, where credentials have on their face raised a question as to the constitutionality of the appointment, the bearer has not been seated on prima facie showing.—On March 4, 1825,[7] at the special session of the Senate, the credentials of Mr. James Lanman, of Connecticut, were presented. This certificate was issued on February 8, 1825, and proposed to commission Mr. Lanman from March 3, 1825, to the next meeting of the legislature of Connecticut. This was a case where the governor had appointed for a vacancy to occur in the future. The Senate decided not to admit Mr. Lanman on his creden-

[1] Journal, p. 14; Record, p. 9.

[2] Journal, p. 42.

[3] Journal, p. 83; Record, p. 97.

[4] First session Thirty-ninth Congress, Journal, p. 39.

[5] Journal, p. 155; Globe, pp. 275, 276.

[6] Journal, P. 977; Globe, p. 3683.

[7] Second session Eighteenth Congress, Contested Election Cases in Congress from 1789 to 1834, page 871.

tials. The report in this case contains a citation of former decisions in similar cases.[1]

[1] In the Senate, where the credentials have on their face indicated the existence of a question as to the constitutionality of the appointment of a Senator, the Senate has referred the credentials and not allowed the bearer to take the oath. See cases of Kensey Johns, of Delaware; Lee Mantle, of Montana; Asahel C. Beckwith, of Wyoming; John B. Allen, of Washington; Henry W. Corbett, of Oregon; Andrew T. Wood, of Kentucky; John A. Henderson, of Florida; Matthew S. Quay, of Pennsylvania; and Martin Maginnis, of Montana. (See Senate Election Cases, special session Fifty-eighth Congress, Senate Document No. 11, pp. 1, 52, 83, 89, 104, 107, and 143.)